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Supreme Court, U. S.
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No. 79 —

IN THE

Supreme Court of the United States

October Term, 1979

E. B. BURGETT and WINNIE BURGETT, *Petitioners,*

v.

THE FEDERAL LAND BANK OF WICHITA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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E. B. BURGETT and WINNIE BURGETT, *Petitioners,*

v.

THE FEDERAL LAND BANK OF WICHITA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Mexico entered in the above case on September 24, 1979.

OPINIONS BELOW

The Final Decree of the District Court of Otero County, New Mexico, Twelfth Judicial District, granting Default Judgment in favor of respondent and against petitioners, foreclosing petitioners' mortgage, ordering judicial sale of petitioners' property, and ordering execution on any deficiency after sale against petitioners, is unreported. The Order of the District Court of

Otero County, New Mexico, supported by Findings of Fact and Conclusions of Law, denying petitioners' motion to set aside the default judgment and vacate the sale of the foreclosed property is also unreported. Copies of the Decree, Order, and Findings of Fact and Conclusions of Law are appended to this petition in Appendices A, B and C, respectively. The decision of the Supreme Court of the State of New Mexico affirming on appeal the Order of the District Court was filed without an opinion and is unreported and is appended to this petition in Appendix D. The Order of the Supreme Court of New Mexico denying petitioners' motion for rehearing is unreported and is appended to this petition in Appendix E. The denial by the United States Supreme Court of the Petition for A Writ of Certiorari filed by petitioners herein, No. 77-391, is reported at 434 U.S. 966 (1977). The subsequent decision of the District Court of Otero County, New Mexico, Twelfth Judicial District, denying the petitioners' second motion to set aside the default judgment and the sale of the foreclosed property is also unreported. The Court's Findings of Fact and Conclusions of Law are also unreported. Copies of the Decision and Findings of Facts and Conclusions of Law of the District Court are appended to this petition in Appendices F and G. The decision of the Supreme Court of New Mexico affirming on appeal the decision of the District Court was filed without an opinion and is unreported. The Order of the Supreme Court of the State of New Mexico denying petitioners' motion for a rehearing is also unreported. These orders of the Supreme Court are appended to this petition in Appendices H and I.

JURISDICTION

The Decision of the Supreme Court of the State of New Mexico was made and entered on September 24, 1979.

Petitioners' motion for rehearing was denied by Order of the Supreme Court on October 9, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

1. Whether New Mexico Rules of Civil Procedure, Rule (4) (e) (1), which permits service of process solely by "posting" a copy of the summons and complaint on the most public part of the "premises" of an absent defendant complies with the Due Process Clause of the Fourteenth Amendment to the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New Mexico rule of civil procedure is N.M.R.Civ.P. (4) (e) (1):

> (e) Summons–How Served

(1) [Making of Service] In civil causes summons and a copy of complaint may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action, over the age of eighteen (18) years. When served by the sheriff, proof thereof shall be made by affidavit. Such service may be made by delivering a copy of the process or papers to be served to the defendant; or if the defendant so refuses to receive such copies or hear the same read, such action shall constitute good service in law. If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served to some person residing at the usual place of abode of the defendant, over fifteen (15) years of age; and if no such person be found willing to accept a copy, then service shall be made by posting such copies in the most public part of defendant's premises.[1]

STATEMENT OF THE CASE

On November 18, 1975, the respondent Bank filed its complaint against the petitioners Burgetts. On November 19, 1975, Emmett B. Owens attempted to serve process on the Burgetts at a house owned by them in the town of Mayhill, Otero County, New Mexico, located in the mountains at a high elevation. The Burgetts had resided in this house until October of 1975 when due to medical reasons they moved to a furnished trailer at 2700 West Washington in Artesia, New Mexico, many miles away. E. B. Burgett is 80 years old and has developed respiratory problems over the past several years. During 1975, his doctors advised him to undergo surgery and to move to a

1. Effective October 1, 1979, and prospectively only, the New Mexico Supreme Court amended Rule (4) (e) (1). That amendment is not involved in this case.

lower elevation to ameliorate these problems. It was in response to his physician's advice that Mr. Burgett and his wife moved to Artesia. Although no longer in Artesia, the Burgetts have never returned to the house in Mayhill and continue to live at lower elevations.

When Mr. Owens attempted to serve process, he found no one at the house in Mayhill. After personally serving petitioners' son, Everett Dale Burgett, who lived in a house across the highway from the Burgetts' house, Mr. Owens asked him where the Burgetts could be found. The younger Burgett told Mr. Owens that his parents no longer lived at the house in Mayhill but refused to disclose their present address in Artesia for reasons of protecting their health.

Mr. Owens then went to Cloudcroft, a nearby town, and asked a police officer where the Burgetts lived. The police officer told Mr. Owens that he believed the Burgetts still resided at the house in Mayhill because he had seen E. B. Burgett recently at the post office in Cloudcroft. After returning to the house in Mayhill, knocking on the door and finding no one present, Mr. Owens attached two copies of the Summons and Complaint to the backdoor of the Burgetts' house in Mayhill. No other method or manner of service on the Burgetts was made or attempted, and particularly no attempt was made to serve the Burgetts by mail either at the post office in Cloudcroft or at any other mailing address. The commencement and pendency of this action were never communicated to the Burgetts either by Everett Dale Burgett or by any other person.

On January 20, 1976, the default of E. B. and Winnie Burgett was entered by order of the District Court of Otero County. On August 5, 1976, The Final Decree of the District Court was entered granting respondent default judgment against the Burgetts.

On August 26, 1976, and for the first time, the Burgetts received, by certified mail, return receipt requested, a copy of the judgment in this case. This copy was properly mailed by the Bank's attorneys to the Burgetts' current residence at 2700 Washington, Artesia, New Mexico, and not to their former residence, where service originally was attempted, in Mayhill, New Mexico. Immediately upon receiving this judgment, they contacted counsel and on September 10, 1976, filed a Motion to Set Aside the Judgment. This Motion was predicated on the ground that Mayhill was no longer their usual place of abode.

After an evidentiary hearing on the Motion, the District Court found that the Burgetts' usual place of abode remained at their house in Mayhill. Although the District Court also found that "no other attempt of service was ever made", the Court nonetheless concluded that service was in compliance with N.M.R.Civ.P. Rule (4) (e) (1) and ruled against the Burgetts.

From denial of their Motion, the Burgetts appealed to the New Mexico Supreme Court challenging all findings of fact and conclusions of law of the lower court. The New Mexico Supreme Court affirmed the District Court holding that substantial evidence supported the findings that notice was given in accordance with the rule. No reference was made to the constitutionality of New Mexico's rule permitting service of process by posting.

The Burgetts subsequently petitioned to the United States Supreme Court for a writ of certiorari challenging the constitutionality of New Mexico's posting rule for violation of due process of law. The Bank responded to the petition challenging, *inter alia,* the jurisdiction of this Court on the grounds that the due process challenge to the New Mexico procedural rule was not properly before this Court because the challenge had not

been squarely presented on those terms to the New Mexico courts. The United States Supreme Court subsequently denied that petition for a writ of certiorari.

The Burgetts then moved a second time to set aside the default judgment, this time squarely basing their Motion on the lack of due process provided in the New Mexico procedure. After considerable delay, the District Court considered the Motion, found that the issue "has not been previously ruled upon by this court", and concluded that the New Mexico posting procedure did, as a matter of law, comport with due process. The District Court also held that its prior decisions were *res judicata* "as to all facts surrounding substituted service of process on defendants in this case."

On the Burgetts' appeal, the New Mexico Supreme Court affirmed the decision of the District Court, relying on *res judicata* "against further claims based on lack of jurisdiction".[2]

REASONS FOR GRANTING THE WRIT

This petition challenges, for violation of due process of law, New Mexico's rule of procedure which permits service of process by posting a summons and a copy of the complaint on the premises of an absent defendant without any assurances that he will ever receive it. This is a novel issue, never having

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2. Petitioner relies to a considerable extent in this petition on *Shaffer v. Heitner,* 433 U.S. 186 (1977), which was decided well after this case began and well after the Burgetts first framed their theories against the constructive service upon them. It would be a clear abuse of the doctrine of *res judicata* to foreclose the Burgetts from their present constitutional challenge, on the basis of their failure to make the present constitutional claims in their first attack on the statute, when these claims only crystallized with the *Shaffer* opinion after their first attack was concluded.

been squarely ruled upon by this Court, yet this Court's prior decisions clearly indicate that New Mexico's posting procedure is constitutionally untenable. Most jurisdictions have abolished posting as a means of notifying defendants, yet New Mexico and a small minority of jurisdictions have held on to an ancient formalism at the expense of constitutional rights. With this Court's recent decision in *Shaffer v. Heitner,* 433 U.S. 186 (1977), New Mexico's legal anachronism is now clearly in conflict with due process of law as well as in conflict with the decisions of at least one State Supreme Court on the identical subject. Litigants in New Mexico and in the remaining minority of jurisdictions need this fundamental issue decided; namely, whether posting as a form of notice is consistent with due process of law, particularly after *Shaffer v. Heitner, supra.*

The import of this Court's recent decision in *Shaffer v. Heitner, supra,* renders New Mexico's posting procedure impermissible under due process of law. In *Shaffer* this Court held, *inter alia,* that a state did not have the constitutional authority to claim jurisdiction solely by virtue of asserting power over a defendant's property. In this respect the Court equalized the policy considerations necessary to justify state jurisdiction, whether *in rem, quasi in rem,* or *in personam,* including the degree of notice to which defendants are entitled under due process, regardless of the particular characterization placed upon the jurisdiction asserted. Although since this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), notice distinctions drawn between *in rem* and *in personam* proceedings have been constitutionally suspect, *Shaffer* now makes it clear that process based merely on the assertion of power over property, without more, cannot be categorically presumed to afford the litigant all that process which is "due" him under the Constitution.

Insofar as New Mexico authorizes *in personam* jurisdiction over absent defendants solely by posting a summons on their

premises, New Mexico continues to rely for her jurisdiction on the assertion of power over property, and therefore, New Mexico's procedure flies squarely in the face of *Shaffer* and its jurisdictional forebearers.[3] Posting is in reality a vestige of the old "caretaker" theory, long discredited by commentators[4] and by this Court.[5] Posting irrebutably presumes that the defendant or his agent is watching over the property, and therefore, that the assertion of some control over that property by the plaintiff, even if only in the form of a posted summons, will, without any additional effort, notify the absent defendant of the pendency of the action. If this assumption were still constitutionally supportable, then posting, without more, would be categorically sufficient in *in rem* actions like eminent domain, and this is not the case today. *Schroeder v. City of New York,* 371 U.S. 208 (1962).[6] New Mexico's "caretaker" assumptions merit the same indecent burial as this Court gave in *Shaffer* to other, like-minded, legal fictions such as "consent to be sued" and "corporate presence."

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3. See *Walker v. City of Hutchinson,* 352 U.S. 112 (1956); *Schroeder v. City of New York,* 371 U.S. 208 (1962); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

4. See, e.g., Comment, Notice by Publication: *Walker v. City of Hutchinson,* 24 U. Chi. L. Rev. 553 (1956); Note, Requirements of Notice in In Rem Proceedings, 70 Harv. L. Rev. 1257, 1271 (1957).

5. See *Walker v. City of Hutchinson, supra,* (notice by publication); *Schroeder v. City of New York, supra,* (notice by publication and posting), both holding as unconstitutional, statutory notice procedures in eminent domain proceedings which were not reasonably designed to notify the landowners regardless of whether actual notice may have reached the defendant as a result of state activities on the land.

6. Compare *Schroeder v. City of New York, supra,* in which notice procedures of publication and posting were found constitutionally inadequate, with *Nelson v. City of New York,* 352 U.S. 103 (1956) in which publication, posting *and mailing* were found adequate. Both were *in rem* actions.

Even New Mexico appears to recognize the inappropriateness of the "caretaker" theory as a basis of jurisdiction. For certain kinds of *in rem* actions such as eminent domain and escheat,[7] New Mexico does not allow service by posting, but requires other notice which is more reasonably assured of alerting the defendant. Therefore, New Mexico defendants are subject to a form of reverse discrimination which guarantees more precise, and more reliable notice for some *in rem* actions than for actions *in personam.* Although *Shaffer* prohibited such distinctions favoring *in personam* litigants, discrimination directed either way is simply intolerable in light of the broad swath cut by the *Shaffer* decision.[8]

Reading *Shaffer* together with *Mullane, Schroeder v. City of New York, supra* and *Walker v. City of Hutchinson,* 352 U.S. 112 (1956), it is clear that just as a state must afford notice without discrimination, a state must also establish those notice

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7. See N.M. Stat. Anno. § 42-1-2 (1978) (proceedings in eminent domain require personal service or leaving notice at the usual place of abode with someone of sufficient age. No posting is permitted.); N.M. Stat. Ann. § 7-8-25 (1978) (proceedings in escheat require actual delivery of pleadings to interested persons known to the state and publication to those unknown. Again, no posting permitted.).

8. New Mexico's tolerance of posting for certain kinds of actions would appear to discriminate in other ways as well. If the Burgetts were residents of another state with property in New Mexico, they would clearly be entitled to personal service, N.M. Stat. Anno. § 38-1-16 (1978). Other *in rem* actions such as those involving property taxes may also result in notice by mailing. N.M. Stat. Ann. § 7-38-79 (1978). This case probably involves both *in personam* jurisdiction (suit on a promissory note) and *quasi in rem* jurisdiction (suit to foreclose a mortgage). That both kinds of jurisdiction are present in this one proceeding underscores the lack of any rational justification for the non-uniformity in New Mexico's jurisdiction.

requirements according to priorities so that, "the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald v. Mabee,* 243 U.S. 90, 92 (1917). If actual, personal notice is not reasonably possible, then the most reliable form of constructive service, such as hand delivery to a relative at the absent defendant's residence, can be looked to as a substitute. If that form of service is unavailing, then the litigant can resort to certified mail and so on. Since *Mullane,* and particularly since *Walker* and *Schroeder,* this kind of sliding scale formula has required that litigants use the mails wherever feasible.[9] As this Court stated in *Mullane v. Central Hanover Bank & Trust Co., supra* at 318:

> "where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

Posting has never been regarded with the same confidence and reliability as the mail.[10]

Shaffer adds to this sliding scale of notice alternatives the notion that the state must now do more than arrange rigid and

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9. In *Walker v. City of Hutchinson, supra* at 116, this court noted that the mails should be employed absent "compelling" reasons.

10. See Fyr, *Shaffer v. Heitner:* The Supreme Court's Latest Words on State Court Jurisdiction, 26 Emory L.J. 739 (1977); Comment, 24 U. Chi. L. Rev. 553, 556, *supra.* One deficiency, among many, of posting is that it is incapable of objective proof or disproof. Most other forms of constructive notice, such as mailing or publication, can at least be documented. Posting is verifiable solely by the uncorroborated word of the process server, who can be anyone over 18, which leaves the defendant at a unique disadvantage in protecting his rights to due process of law.

formalistic methods of service according to priorities. As the facts and circumstances of each case will differ, so too should the notice efforts of each plaintiff differ under the tests of "fairness" and the "traditional notions of fair play and substantial justice". *Shaffer v. Heitner, supra* at 203. State rules of procedure must now not only establish the minimal efforts at constructive service which plaintiffs must undertake to achieve actual notice, but these rules must also require plaintiffs to take whatever additional steps toward notice which may be fair and reasonable under the circumstances of the case.[11]

New Mexico's rule of posting fails on all fronts to meet these new constitutional standards. New Mexico has made very little effort at balancing and establishing priorities prior to permitting posting as a last resort at constructive service. Under the New Mexico rule if the defendant cannot be personally located, and if his residence is vacant, then the plaintiff can proceed forthwith to post the summons without any additional effort at actual notice. The defendant may be away on an extended vacation; he may be on convalescence elsewhere; regardless, the plaintiff is not required even to inquire. The plaintiff need not ask about a mailing address or even mail a letter when the mailing address is known which is in total disregard for the clear preference articulated by this Court in

11. See Lacy, Personal Jurisdiction and Service of Summons After Shaffer v. Heitner, 57 Ore. L. Rev. 505, 515 (1978). Other commentators have noted with approval those state laws which, like New York and California, require proof of "due diligence" in attempts to serve process by the plaintiff in light of the circumstances of the case and beyond those measures set forth in the procedural rule. See Comment, Personal Jurisdiction Over Absent Natural Persons, 44 Calif. L. Rev. 737 (1956); Note, Constitutionality of Constructive Service of Process on Missing Defendants, 48 N.C. L. Rev. 616 (1970).

Mullane and subsequent cases for the mail as the constitutionally mandated form of constructive service.[12] Moreover, New Mexico fails to require that the plaintiff make any additional, unenumerated efforts at actual notice which may be reasonable under the circumstances of the case, and therefore, New Mexico's rule fails to adapt itself to the call for flexibility over formalism articulated in *Shaffer.* For all these reasons, New Mexico's rule simply "creates an unacceptable risk of judgment without notice." *Shaffer v. Heitner, supra* at 218. (Stevens J. concurring).

New Mexico's rule of service is an anachronism among the great majority of the states. Although service of process by posting was at one time widely used,[13] most jurisdictions have now either abolished it completely or utilize posting only when coupled with other, more reliable forms of service, usually the mails, or when accompanied by a specific court order.[14] Only

12. The constitutional requirement of mailing, where feasible, breaks sharply against the facts of this particular case. The process server was aware of the Burgetts' post office address, as that was one basis for his assumption that the Burgetts still resided in Mayhill. After default, the judgment was mailed to the Burgetts at their correct address in Artesia. See Statement of the Case, *supra.* The "mailing of a single letter" would have discharged the Bank's notice obligation in this case. *Schroeder v. City of New York, supra* at 214.

13. See generally, Anno., Service of Process-Sufficiency, 126 A.L.R. 1474 (1940) and cases discussed therein.

14. See chart at Appendix J. comparing the 51 jurisdictions. Most jurisdictions do not allow posting even in conjunction with other forms of notice such as mailing. Mailing is clearly the preferable form of constructive notice, being most closely designed to apprise the defendant of the lawsuit.

six jurisdictions now permit posting alone.[15] At least one change came by judicial decision when the Georgia Supreme Court overturned a rule on posting identical to New Mexico's for violation of due process of law.[16] The decisions of the New Mexico courts in the case at bar, when juxtaposed against the more enlightened holding of the Georgia Supreme Court, create a conflict among the states in the interpretation of a provision of the federal constitution which only the United States Supreme Court can and should resolve.

Although New Mexico's rule has been bypassed by time, it is obviously still capable of inflicting injustice of constitutional proportions. That injustice can be equally inflicted in the six jurisdictions which presently authorize posting alone as a method of service of process. Pursuant to the Federal Rules of Civil Procedure, Fed.R.Civ.P. (4) (d) (7), federal court litigants in those six jurisdictions are also free to utilize this barbarous

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15. Massachusetts, Connecticut, Mississippi, Nebraska, New Hampshire, West Virginia. Mississippi will apparently abolish posting in the near future. See Abbot, The Proposed Mississippi Rules of Civil Procedure — An Argument for Adoption, 49 Miss. L. J. 285 (1978). New Mexico has recently amended its rule to require mailing along with posting. Unfortunately, the change came too late to help the Burgetts who are still positioned with the defendants in the minority of jurisdictions.

16. *Womble v. Commercial Credit Corp.*, 231 Ga. 569, 203 S.E.2d 204 (1974). The Court stated at 206:

> "The mere leaving of a copy of the suit at the residence of the defendant is not reasonably calculated to apprise him of the pendency of an action against him. He may be absent from such residence for an extended length of time. He may be in the process of moving from one residence to another. The copy may be destroyed by inclement weather, or be removed by other persons. We therefore conclude that the [code], authorizing service by leaving a copy at the residence of the defendant, was in violation of the due process clause of the Fourteenth Amendment of the United States Constitution."

procedure,[17] and therefore, this Court's superintending responsibility over the federal courts is directly implicated by this case. In addition, this Court's decision in *Shaffer* now renders intolerable what, arguably, could have been left to a state's discretion only a few years ago, and therefore, states like New Mexico need this Court's guidance as to the far-reaching implications of that decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted, and that, in the alternative, this Court summarily reverse the decision of the Supreme Court of New Mexico as being in conflict with *Shaffer v. Heitner,* 433 U.S. 186 (1977); or, remand this case to the Supreme Court of New Mexico with instructions to reconsider its decision in light of *Shaffer;* or, grant permission for the filing of briefs and oral argument in this Court.

Respectfully submitted,

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17. Fed.R.Civ.P. (4) (d) (7) permits service of process upon an individual defendant:

> ". . . in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

APPENDIX A

IN THE DISTRICT COURT OF OTERO COUNTY, NEW MEXICO
TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a corporation
Plaintiff,

VS.

E. B. BURGETT, et al., and WINNIE BURGETT, his wife; EVERETT DALE BURGETT; BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation; BURGETT FLORAL COMPANY, a New Mexico Corporation; MICHELLE IMPORTING COMPANY; DENVER WHOLESALE FLORISTS CO.; VAUGHAN-JACKLIN CORPORATION, d/b/a VAUGHAN SEED COMPANY; STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION; UNITED STATES OF AMERICA, *Defendants*.

Final Decree

(Filed 8/5/76)

THIS CASUE having come on to be heard by the Court on the Motions of the Plaintiff for Judgment in accord with the prayer of the Complaint; the Plaintiff appearing by its attorney, Norman D. Bloom, Jr., of the law firm of FETTINGER AND BLOOM; the Defendant Everett Dale Burgett having appeared pro se; and the Defendants, E. B. Burgett, Winnie Burgett, Burgett Wholesale Floral Company, and Burgett Floral Company, having appeared not; and the Court having examined and considered the records and files herein and being sufficiently advised in the premises, FINDS:

1. That the Complaint of the Plaintiff was duly filed and Summons issued.

2. That the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, were duly served with Summons and a

copy of the Complaint on the 19th day of November, 1975, as evidenced by the Sheriff's return duly filed herein.

3. That the Defendant, EVERETT DALE BURGETT, was duly served with Summons and a copy of the Complaint on the 19th day of November, 1975.

4. That the Defendants, BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation, and BURGETT FLORAL COMPANY, a New Mexico Corporation, were duly served with Summons and a copy of the Complaint on the 19th day of November, 1975, as evidenced by the Sheriff's return duly filed herein.

5. That the Defendant, MICHELE IMPORTING COMPANY, was duly served with a Summons and a copy of the Complaint on the 24th day of November, 1975 and subsequently thereto filed its Affidavit of Disclaimer and waiver as to any right or interest in the land herein involved.

6. That the Defendant, VAUGHN-JACKLIN CORPORATION, d/b/a VAUGHAN SEED COMPANY, was duly served with a Summons and a copy of the Complaint on the 1st day of November, 1975, as evidenced by the return duly filed herein. However, VAUGHAN-JACKLIN CORPORATION, d/b/a VAUGHN SEED COMPANY subsequently dismissed out of this action on the 2nd day of March, 1976, as having no right, title or claim of interest to the land herein involved.

7. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT COMMISSION was duly served with a Summons and a copy of the Complaint on the 21st day of November, 1975, as evidenced by the return duly filed herein.

8. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION has filed its Answer herein.

9. That Defendant, UNITED STATES OF AMERICA, through its Internal Revenue Service, was duly served with a Summons and a copy of the Complaint on the 24th day of November, 1975, as evidenced by the return duly filed herein, and subsequently on January 30, 1976, dismissed out as

having no right, title or interest in land being foreclosed herein.

10. That the Defendant, DENVER WHOLESALE FLORISTS Co., was not served as it was found they were included by inadvertence and error and were dismissed from this action on the 14th day of July, 1976.

11. That the default of the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, was duly entered herein by judicial order on the 29 day of January, 1976.

12. That the default of the Defendants, BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation, and BURGETT FLORAL COMPANY, a New Mexico corporation, was duly entered herein by judicial order on the 29 day of January, 1976.

13. Summary Judgment against the Defendant, EVERETT DALE BURGETT, pro se, was duly entered herein by judicial order on the 15th day of July, 1976.

14. That this Court has jurisdiction of the parties and the subject matter hereto.

15. That the Plaintiff has sustained, by sufficient and competent evidence, all allegations set out in the Complaint, and that said allegations are taken and considered as true.

16. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION, has sustained, by sufficient and competent evidence, all the allegations set out in its Answer, and that said allegations are taken and considered as true.

17. That the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, are justly indebted to the Plaintiff, in the principal amount of TWO HUNDRED NINE THOUSAND FOUR AND 26/100 ($209,004.26) DOLLARS plus interest accumulation in the sum of NINETEEN THOUSAND TWO HUNDRED NINETY-THREE AND 03/100 ($19,293.03) DOLLARS to the

15th day of July, 1976, with further accumulation at the rate of $66.816 per day to the date of Judgment entered herein, plus reasonable attorney's fees in the amount of $5,000.00, to be set by this Court, plus costs expended herein amounting to $178.55.

18. That the real estate mortgage duly executed by Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, and recorded in Book 375, Page 736, of the Records of Otero County, New Mexico, is a valid and existing first lien on the premises described herein, and secures the repayment of the amount due to the Plaintiff as set forth above.

19. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION, has disclaimed all right, title and interest and claims to this cause of action by their disclaimer filed in the Court Record August 5, 1976.

20. That the payments on the note which is secured by the above described mortgage in favor of the Plaintiff, are now in default, and have been in default since the 1st day of February, 1974.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that:

1. The Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, have Judgment against the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife; BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation; BURGETT FLORAL COMPANY, a New Mexico corporation; and EVERETT DALE BURGETT, in the principal amount of Two HUNDRED NINE THOUSAND FOUR AND 26/100 ($209,004.26) DOLLARS plus interest from the 29th day of September, 1975, at the rate of $66.816 until paid in full, plus reasonable attorney's fees in the amount of $5,000.00, which are hereby set by this Court, plus costs expended herein amounting to $178.55.

2. Mortgage in favor of the Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, recorded in Book 375, Page 736,

of the Records of Otero County, New Mexico, a copy of which mortgage is marked Exhibit B and attached to the Complaint filed herein, is a valid and existing first lien on the following described real estate:

> NE1/4 SE 1/4 Section 10, T16S, R13E, N.M.P.M., less lands in deed from E. B. Burgett to H. B. Burgett described in deed recorded in Book 259, Page 322, containing 10 acres;
>
> S1/2 SW1/4; NW1/4 SW1/4; Section 11, T16S, R13E, N.M.P.M.;
>
> together with all water rights and all wells and equipment used for irrigation of said land,

and that said mortgage be foreclosed and the above described property be sold according to the laws and statutes of the State of New Mexico, and that the net proceeds of said sale shall be applied, after the payment of the expenses of said sale, first to the amount due to the Federal Land Bank of Wichita, a corporation, Plaintiff herein, as set forth above.

3. That the Plaintiff or any other party to this suit may become a purchaser at said foreclosure sale.

4. That execution issue for any deficiency which may remain due and owning to the Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, after application of all of the net proceeds of any foreclosure sale on the above described property.

5. Frank K. Wilson is hereby appointed Special Master for the purpose of selling the property described in the Complaint, and described above, at a foreclosure sale, in accordance with the laws of the State of New Mexico; and

that he is here authorized a fee of $100.00 for his services as Special Master.

/s/
District Judge

APPROVED AS TO FORM:

FETTINGER AND BLOOM

By /s/
Norman D. Bloom, Jr.
Attorney for Plaintiff

R. Baumgartner
Attorney for State of New Mexico
Employment Security Commission

APPENDIX B

IN THE DISTRICT COURT OF OTERO COUNTY, STATE OF NEW MEXICO, TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a Corporation,
Plaintiff,

VS.

E. B. BURGETT, ET AL, *Defendants*

Court's Findings of Fact and Conclusions of Law

1. This Court has jurisdiction over both the subject matter and the parties hereto.

2. Defendants appeared specially for contesting acquisition of jurisdiction in this action.

3. This foreclosure action was filed to this Court on November 18, 1975.

4. E. B. Burgett and Winnie Burgett are Defendants in this cause of action before the Court.

5. E. B. Burgett and Winnie Burgett were each separately served a summons, with a copy of the complaint attached, thereto.

6. No other attempt of service was ever made.

7. E. B. Burgett and Winnie Burgett, at the time this action was filed, were the record owners of the real estate being foreclosed herein.

8. E. B. Burgett and Winnie Burgett were the mortgagors of the mortgage being foreclosed herein by Plaintiff.

ENTERED
REC. 49 PA. 10445

9. E. B. Burgett and Winnie Burgett were each served process on November 19, 1975.

10. Emmett Owens an adult over the age of 18 years of age, served a copy of the summons, with the complaint attached, on both E. B. Burgett and Winnie Burgett by firmly attaching two sets of said summons and complaint enclosed in a clear plastic bag to the most commonly used door of the E. B. Burgett and Winnie Burgett premises and usual place of abode.

11. The door to which a separate summons, with a copy of the complaint attached, for each of the Defendants, E. B. Burgett and Winnie Burgett was attached to the most public door and part of the premises in the usual place of abode of the two Defendants.

12. At the date and time the summons was served on E. B. Burgett ond Winnie Burgett the Defendants, being man and wife, lived in the only house across U.S. Highway 82 from the Burgett Greenhouses located between Cloudcroft and Mayhill, New Mexico.

13. Everett Dale Burgett is the son of E. B. Burgett and Winnie Burgett.

14. Everett Dale Burgett is an adult male over the age of 18 years of age.

15. For at least two-years prior to September 17, 1976, Everett Dale Burgett has been responsible for and has attended to all of the legal and business affairs of E. B. Burgett and Winnie Burgett.

16. E. B. Burgett and Winnie Burgett received a copy of the final decree of foreclosure in this action on August 9, 1976.

17. On or about the 19th day of August, 1976, a copy of the final decree in this action was delivered to these De-

fendants by certified mail to their Artesia, New Mexico residence.

18. E. B. Burgett and Winnie Burgett gave the copy of the final decree of foreclosure received by them on August 9, 1976 to their son Everett Dale Burgett to take care of and do something about it.

19. Everett Dale Burgett was the manager and agent at all times material herein for E. B. Burgett and Winnie Burgett.

20. Everett Dale Burgett was personally served with summons, with a copy of the complaint attached, in this action on November 19, 1975.

21. E. B. Burgett and Winnie Burgett were temporarily in, Artesia, New Mexico when service of process in this case was served on each of them by posting to the most public door of their usual place of abode and legal premises.

22. E. B. Burgett and Winnie Burgett domicile, residence and legal premises on November 19, 1975 was the house were Emmett Owens tacked a summons, with a copy of the complaint attached, for each of the two Defendants.

23. E. B. Burgett and Winnie Burgett usual place of abode and premises was the house to which a summons, with complaint attached, for each of them was tacked on November 19, 1976 by Emmett Owens.

Conclusions of Law

1. This Court has jurisdiction of both the subject matter and the parties herein.

2. Service of process was properly made upon E. B. Burgett and Winnie Burgett on November 19, 1975.

3. Service of process was properly made upon E. B. Burgett and Winnie Burgett by posting of a summons,

with a copy of the complaint attached, for each of the two Defendants.

4. Notice of service of summons was properly posted and tacked to the most public door and most public part of the premises and the usual place for abode of E. B. Burgett and Winnie Burgett.

5. Separate summons, with a copy of the complaint attached, were posted to the door of the usual place of abode of E. B. Burgett and Winnie Burgett giving both notice of the cause of action filed herein.

6. Everett Dale Burgett, son, manager ond agent for E. B. Burgett and Winnie Burgett was personally served with a summons, with a copy of the complaint attached, hereto and had full knowledge of the action on file herein.

7. E. B. Burgett and Winnie Burgett place of domicile and resident and usual place of abode was the house to which a summons, with a copy of the complaint attached, was posted for each of the two Defendants.

8. The door to which a summons for each of the Defendants, with a copy of the complaint attached, was posted at the most public part of the E. B. Burgett and Winnie Burgett premises.

9. E. B. Burgett and Winnie Burgett were properly served with service of process in this action and had notice of this action of foreclosure.

/s/ Geo. L. Zimmerman
Geo. L. Zimmerman
District Judge

APPENDIX C

IN THE DISTRICT COURT OF OTERO COUNTY, NEW MEXICO
TWELFTH JUDICIAL DISTRICT

No. 17,472

The Federal Land Bank of Wichita, *Plaintiff*,

vs.

E. B. Burgett and Winnie Burgett, et al, *Defendants*.

Order

This Matter having come on before the Court on the Motion of the Defendants and with the Plaintiff being represented by its attorneys the Law Firm of Fettinger and Bloom and the Defendant being present in Court and represented by his attorney, Mr. Don Higginbotham, the Court having heard the evidence and examined the exhibits on file herein, both parties having submitted requested Findings Of Fact and Conclusions of Law and the Court being fully advised in the premises having entered its Findings of Fact and Conclusions of Law.

It Is Ordered, Adjudged and Decreed that E. B. Burgett and Winnie Burgett, Defendants in this action, were each properly served with a summons, with a copy of the complaint attached, and the Motion to vacate the sale by Special Master of the foreclosed property herein, is denied.

/s/ Geo. L. Zimmerman
Geo. L. Zimmerman
District Judge

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE FEDERAL LAND BANK OF WICHITA, *Plaintiff-Appellee,*

vs.

E. B. BURGETT and WINNIE BURGETT, et al.,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

Decision

(Filed June 13, 1977)

Since there is substantial evidence to support the district court's finding that notice was properly given by posting process on the most public part of appellants' usual place of abode, the decision of the trial court is affirmed.

/s/ DAN SOSA, JR.
Dan Sosa, Jr., *Justice*

We Concur:

/s/ JOHN B. MCMANUS, JR., *Chief Justice*

/s/ MACK EASLEY
Mack Easley, *Justice*

ATTEST: A TRUE COPY

ILLEGIBLE
Clerk of the Supreme Court of the State of New Mexico

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, June 30, 1977

No. 11,304

THE FEDERAL LAND BANK OF WICHITA, *Plaintiff-Appellee,*

vs.

E. B. BURGETT and WINNIE BURGETT, et al.,
Defendants-Appellants.

This cause coming on for consideration by the Court upon motion of Appellants for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that motion of Appellants for rehearing be and the same is hereby denied.

APPENDIX F

IN THE DISTRICT COURT OF OTERO COUNTY,
NEW MEXICO, TWELFTH JUDICIAL DISTRICT
DIVISION I

THE FEDERAL LAND BANK OF WICHITA,
a corporation,
Plaintiff,

vs NO. 17472

E. B. BURGETT and
WINNIE BURGETT,
Defendants.

ORDER

THIS MATTER having come before the Court on the 8th day of January, 1979, upon Defendants' motion to vacate the judgment and foreclosure heretofore ordered and to dismiss Plaintiff's motion requesting that this Court order Defendants to vacate the premises herein involved, both parties having submitted Findings of Fact and Conclusions of Law and the Court having filed its Findings of Fact and Conclusions of Law herein,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' motion to vacate the judgment and order of foreclosure heretofore entered by this Court is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's motion requesting this Court to order Defendants to vacate the premises herein involved is granted and the Defendants are hereby ordered to vacate the land and improvements involved herein within 30 days of the date of this order.

/s/ Geo. L. Zimmerman
District Judge

APPENDIX G

IN THE DISTRICT COURT OF OTERO COUNTY,
STATE OF NEW MEXICO
TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a corporation, Plaintiff, vs.	
E. B. BURGETT & WINNIE BURGETT, Defendants,	No. 17472

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT:

1. This Court has jurisdiction of both the subject matter and the parties hereto.

2. On January 8, 1979, this matter came before the Court upon the Defendant's Motion for an Order pursuant to N.M.S.A. (21-1-1 (60) (b) (6) to set aside the default judgment entered in the above entitled action on August 5, 1976.

3. That this Motion is properly before the Court and has not been previously ruled upon by the Court.

4. The Federal Land Bank of Wichita (hereinafter "Bank") filed suit on November 18, 1975 against E. B. Burgett and Winnie Burgett, their son Dale Burgett, and two closely held New Mexico corporations controlled by them as makers of a note.

5. The Bank in this action also sought to foreclose the mortgage given by E. B. and Winnie Burgett to secure the note.

6. On November 19, 1975, Emmett Owens attempted to serve process on E. B. Burgett and Winnie Burgett at a house owned by them in Mayhill, Otero County.

7. Finding no one at the Burgetts' house, Mr. Owens left two copies of the Summons and Complaint attached to the back door of the house in Mayhill, New Mexico.

8. On January 20, 1976, default was entered against E. B. and Winnie Burgett, on July 15, 1976, summary judgment was entered on Dale Burgett, who appeared pro se, and on August 5, 1976, the Final Decree of this Court was entered.

9. E. B. and Winnie Burgett were served in the action leading to the default judgment pursuant to N.M.S.A. 21-1-(4) (e) (1) which states in pertinent part:

> ". . . If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served to some person residing at the usual place of abode of the defendant, over fifteen (15) years of age; *and if no such person be found willing to accept a copy, then service shall be made by posting such copies in the most public part of defendant's premises."* (Emphasis added)

10. Defendants' motion of September 19, 1977 was held in abeyance and no hearing held thereon until January 8, 1979.

11. Defendants, on September 19, 1977, additionally filed a motion to vacate an order of eviction to the Defendants to vacate the premises here involved. This motion was also held in abeyance by this Court until January 8, 1979.

12. The Defendants were served at their usual place of abode as heretofore found by this court in its Findings of Fact and Conclusions of Law in the hearing on Defendants' September 10, 1976 motion to vacate the default judgment against Defendants.

13. 21-1-1 (4) (e) (1) NMSA, 1953 provisions for substituted service are reasonably calculated to give Defendants actual notice of the proceedings against them and an opportunity to be heard.

14. If any changes in the methods of substituted service for domiciliaries of the State of New Mexico are to be made then such must be made by the New Mexico legislature.

15. The default judgment against the Defendants heretofore issued by this Court should not be vacated.

16. The order to Defendants to vacate the premises herein involved should not be vacated.

17. The substituted service of process provisions of 21-1-1 (4) (e) (1) NMSA, 1953, were fully complied with in service of process on Defendants at their usual place of abode prior to a default judgment being entered by this Court on August 5, 1976.

18. Defendants have been at all times during this cause of action domiciliaries of the State of New Mexico.

CONCLUSIONS OF LAW:

1. This Court has jurisdiction of both the subject matter and the parties hereto.

2. The Findings of Fact and Conclusions of Law of this court entered in this court's decision on Defendants' September 10, 1976, motion to vacate the default judgment against the Defendants are res judicata as to all facts surrounding substituted service of process on Defendants in this case.

3. The provisions of 21-1-1 (4) (e) (1) NMSA, 1953, provide for substituted service of process upon a defendant absent from his usual place of abode in a manner reasonably calculated to give him actual notice.

4. 21-1-1 (4) (e) (1) NMSA, 1953 comports with the requirements of due process of law and is constitutionally valid. Defendants were properly served by substituted service of process and had notice of this cause of action in full compliance with the provisions of 21-1-1 (4) (e) (1), NMSA, 1953. The default judgment against the Defendants entered by this court August 5, 1976, is a valid and enforceable order and should not be vacated.

/s/ Geo. L. Zimmerman
Geo. L. Zimmerman
District Judge–Division I

APPENDIX H

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

FEDERAL LAND BANK OF WICHITA,
a corporation,
Plaintiff-Appellee,
vs. No. 12, 403
E. B. BURGETT and WINNIE
BURGETT, et al.,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

ORDER

We hereby affirm the decision of the district court denying the Burgetts' motion under N.M. Civ. P. 60(b), N.M.S.A. 1978. This Court has previously affirmed an order of the Twelfth Judicial District Court denying a motion by the Burgetts to vacate the final decree where claims of lack of personal jurisdiction were raised. We believe that our previous affirmance serves as res judicata against further claims based on lack of jurisdiction. *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932).

This order is not to be published or cited as precedent.

IT IS SO ORDERED.

/s/ Dan Sosa Jr.
DAN SOSA, JR., Chief Justice

WE CONCUR:
/s/ William R. Federici
WILLIAM R. FEDERICI, Justice
/s/ Edwin L. Felter
EDWIN L. FELTER, Justice

APPENDIX I

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO
Tuesday, October 9, 1979

NO. 12,403

FEDERAL LAND BANK OF WICHITA,
a corporation,

Plaintiff-Appellee,

vs. --- Otero County

E. B. BURGETT and
WINNIE BURGETT, et al.,

Defendants-Appellants.

This matter coming on for consideration by the Court upon Motion of Appellant for rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the motion of Appellant for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY

Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

SEAL

SUPREME COURT
STATE OF NEW MEXICO

APPENDIX J

RULES OF SERVICE OF PROCESS AMONG THE 51 AMERICAN JURISDICTIONS

State	Service upon Defendant personally	Service by leaving with someone at abode	Service by posting
Alabama	Yes		
Alaska	Yes	Suitable age and discretion	
Arizona	Yes	Suitable age and discretion	
Arkansas	Yes offer copy	Family over 15	
California	Yes	18 yrs. or older, inform and mail	
Colorado	Yes	Clerk – usual place of business, family over 18	
Connecticut	Reading		leave
Delaware	Yes	Adult	
District of Columbia	Yes	Suitable age or discretion	
Florida	Yes	Family 15 or older and inform	
Georgia	Yes	Suitable age and discretion	
Hawaii			
Idaho	Yes	Over 18, residence	
Illinois	Yes	Family 13 or older and inform and mail	
Indiana	Yes	Suitable age and discretion, residence and mail	
Iowa	Yes	18 or older	
Kansas	Yes	Suitable age and discretion	with court order leave
Kentucky	Yes		
Louisiana	Yes	Suitable age and discretion residence	
Maine	Yes	Suitable age and discretion residence	with court order leave
Maryland	Yes		
Massachusetts	Yes		leave
Michigan	Yes		
Minnesota	Yes	Suitable age and discretion, residence	
Mississippi	Yes	Family over 16	post

State	Service upon Defendant personally	Service by leaving with someone at abode	Service by posting
Missouri	Yes	Family over 15	
Montana	Yes		
Nebraska	Yes		leave
Nevada	Yes	Suitable age and discretion, residence	
New Hampshire	Yes		leave copy
New Jersey	Yes	14 or over, residence	
New Mexico	Yes	Over 15	post and mail
New York	Yes	Suitable age, discretion and mailing	post and mail
North Carolina	Yes	Suitable age, discretion, residence	
North Dakota	Yes	Suitable age and discretion, residence	
Ohio	Yes	Suitable age and discretion	
Oklahoma	Yes	Family over 15	
Oregon	Yes	Family over 14	
Pennsylvania	Yes	Adult	
Rhode Island	Yes	Suitable age and discretion, residence	
South Carolina	Yes	Discretion	
South Dakota	Yes	Family over 14	
Tennessee	Yes	Suitable age and discretion, residence	
Texas	Yes	Court order, over 16	with court order leave
Utah	Yes	Suitable age and discretion, residence	
Vermont	Yes	Suitable age and discretion residence	with court order leave
Virginia	Yes	Family 16 or older	post and mail
Washington	Yes	Suitable age and discretion, residence	
West Virginia	Yes	Family over 16 and inform	post
Wisconsin	Yes	Family 14 or older and inform	
Wyoming	Yes	Employees over 14 Family over 14	

Supreme Court, U. S.
FILED
FEB 4 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-973

E. B. BURGETT AND WINNIE BURGETT, *Petitioners*

V.

THE FEDERAL LAND BANK OF WICHITA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

George E. Fettinger
Norman D. Bloom, Jr.
Kim Jerome Gottschalk
Counsel for Respondent
Post Office Drawer M
Alamogordo, New Mexico 88310

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-973

E. B. BURGETT AND WINNIE BURGETT, *Petitioners*

V.

THE FEDERAL LAND BANK OF WICHITA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions are stated in the Petitioner's Brief.

JURISDICTION

Respondent maintains that this Court lacks jurisdiction as the issues raised in the Petition were not timely presented to or ruled upon by the New Mexico Supreme Court.

QUESTIONS PRESENTED

1. Whether the constitutionality of Rule (4) (e) (1) of the New Mexico Rules of Civil Procedure, which permits service of process by posting a copy of the summons and complaint at the most public part of defendant's usual

place of abode was properly raised in the New Mexico Supreme Court so as to provide jurisdiction for this Court to review the New Mexico Supreme Court decision?

2. Whether Rule 4 (e) (1) of the New Mexico Rules of Civil Procedure, which permits service of process by posting a copy of the summons and complaint on the most public part of the premises at the usual place of abode of an absent defendant complies with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The jurisdictional provision involved is 28 U.S.C. Section 1257 (3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, May be reviewed by the Supreme Court as follows:

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States, June 25, 1948, c.646, 62, Stat. 929.

The remaining provisions involved are as set forth in Petitioners' Brief.

STATEMENT OF THE CASE

On November 18, 1975, The Bank filed its complaint against the Burgetts. On November 19, 1975, Emmett B. Owens attempted to serve process on the Burgetts at a house owned and lived in by them located between Cloudcroft and Mayhill, New Mexico. The Burgetts lived and resided in this house for a great number of years and at the time of attempted service by Mr. Owens, were still residing in the house, although temporarily in Artesia, New Mexico.

When Mr. Owens attempted to serve process, he found no one at the house located between Cloudcroft and Mayhill, New Mexico. He personally served Everett Dale Burgett, who was quarantor of the promissory note secured by the mortgage being forclosed. He is the son of E. B. Burgett and Winnie Burgett, and their agent and manager of their business being operated from the premises and property being foreclosed. Mr. Owens asked Everett Dale Burgett where his parents could be found. He refused to disclose his parents whereabouts, giving no reason for his refusal.

Mr. Owens then went to Cloudcroft, New Mexico, and asked Rex Briscoe, a police officer, where the Burgetts lived. Mr. Briscoe directed Mr. Owens to the house between Cloudcroft and Mayhill, New Mexico where the Burgetts lived and which they owned. Officer Briscoe informed Mr. Owens that he was sure the Burgetts still resided at this house that he had described because he had seen E. B. Burgett recently at the post office in Cloudcroft, New Mexico. Upon returning to the Burgett house, Mr. Owens determined the most public door of the Burgett domicile and home. He knocked on the door and finding no one present, he attached two copies of the Summons and Complaint to the back door of the Burgett's home.

On January 20, 1976, the default of E. B. and Winnie Burgett was entered by order of the District Court of Otero County. On July 15, 1976, summary judgment was entered against Everett Dale Burgett, who appeared pro se. On August 5, 1976, the Final Decree of the District Court was entered granting respondent default judgment against the Burgetts and summary judgment against Everett Dale Burgett. On September 10, 1976, a motion to set aside the judgment was filed predicated on the grounds that "no proper service of process was ever had on the Burgetts", claiming they no longer resided at the house between Cloudcroft and Mayhill, New Mexico, on the date and time of service.

After an evidentiary hearing on the Motion, the District Court made findings of fact and conclusions of law denying the Burgetts' motion to set aside the judgment and holding that the Burgetts were properly served. The findings of fact and conclusions of law relied on by the District Court included: the Burgetts were each served process on November 19, 1975, by attachment of two sets of summons and complaints, enclosed in a clear plastic bag, to the most commonly used door of the premises and usual place of abode of E. B. Burgett and Winnie Burgett; that the Burgetts were temporarily in Artesia, New Mexico; that Everett Dale Burgett was the son, agent, and manager of the business affairs of E. B. Burgett and Winnie Burgett, and had been responsible and attended to all the legal and business affairs of E. B. Burgett and Winnie Burgett; and conclusions of law that services of process was properly made upon both the Burgetts by posting two summons with copy of complaint attached to the most public door and most public part of the premises of the Burgetts; a conclusion that Everett Dale Burgett, son, manager and agent for the Burgetts, was personally served with a summons with a copy of the complaint attached, and had full knowledge of

the action on file herein.

Following denial of the motion, the Burgetts appealed to the New Mexico Supreme Court. The Burgetts' appeal specifically challenged all of the District Court's findings and conclusions of law, arguing that there was not substantial evidence upon which the Court had based its conclusion that service of process was properly made on them.

The decision of the Supreme Court of New Mexico affirming the decision of the District Court was without opinion, merely holding that there was substantial evidence supporting all of the findings and conclusions made by the trial court. See Appendix D of Petitioners' Brief. The Burgetts' Motion For Rehearing was also denied by the Supreme Court of New Mexico, again without opinion.

The Burgetts petitioned this Court to grant certiorari (No. 77-391). It was in their Petition For A Writ of Certiorari that the Burgetts for the first time raised the question of the constitutionality of Rule (4) (e) (1). See Petitioner's Brief page 6. The denial of the Writ is reported at 434 U. S. 966 (1977).

The Burgetts then moved a second time, in the State District Court to set aside the default judgment, this time basing their Motion on an alleged lack of due process provided in the New Mexico procedure. The District Court concluded that the New Mexico posting procedure did, as a matter of law, comport with due process. The District Court also held that its prior decisions were res judicata "as to all facts surrounding substituted service of process on defendants in this case."

On the Burgetts' appeal, the New Mexico Supreme Court affirmed the decision of the District Court, stating, "We believe that our previous affirmance serves as res judicata against further claims based on lack of jurisdiction. *American Surety Company v. Baldwin*, 287 U. S.

156 (1932)." See Appendix H to the Petitioner's Brief.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED BY PETITIONERS WERE NOT TIMELY RAISED IN THE NEW MEXICO COURTS, THEREFORE THIS COURT HAS NO JURISDICTION TO GRANT THE WRIT.

The question of whether Rule 4 (e) (1) of the New Mexico Rules of Civil Procedure, as it relates to substituted service, violates the due process clause of the Fourteenth Amendment to the United States Constitution was not timely presented to the New Mexico Supreme Court, and was not considered by it. Therefore this Court has no jurisdiction to review those questions.

Petitioners seek to invoke this Court's jurisdiction under 28 U. S. C. Section 1257 (3). It is a precondition to the existence of jurisdiction under this section that the federal question upon which review is sought was presented to and ruled upon by the state court. *Cardinale v. Louisiana*, 394 U. S. 437 (1969). The assertion of a federal right must have been clear. This Court's jurisdiction does not arise from mere inference. *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655 (1897). Rule 23 (1) (f) of the United States Supreme Court places the burden on Petitioners to show the federal questions were raised, how they were raised and the manner in which they were passed upon by the state court. Petitioners have not met any of these requirements.

The order of the New Mexico Supreme Court which Petitioners want this Court to review could not be more clear. Its decision affirming the New Mexico District Court's denial of Petitioner's second motion to set aside the judgment against them was not based on any consideration of the validity or invalidity of Rule 4 (e) (1).

The affirmance of the New Mexico Supreme Court was based on the determination that "... our previous affirmance serves as res judicata against further claims based on lack of jurisdiction." Citing *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932). See Appendix H of Petitioner's Brief. The Court's previous Order was based on a finding of substantial evidence and likewise did not involve any consideration of the constitutional issue. See Appendix D of Petitioner's Brief. The decision of the New Mexico Supreme Court was thus based on an adequate and independent state ground not reviewable by this Court. *Fox Film Corp. v. Muller*, 296 U. S. 207 (1935). *Berea College v. Kentucky*, 211 U. S. 45, 53 (1908).

Petitioners do not point to anything in the record to indicate that any federal questions were timely raised at trial, on appeal to the New Mexico Supreme Court, or in the Motion for Rehearing filed in the New Mexico Supreme Court. Their only claim is that since their constitutional argument only crystalized as a result of the Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977) it would be an abuse of the doctrine of res judicata to foreclose the Burgetts from their present constitutional challenge. This argument is promptly contradicted on the very next page of their brief where they argue that this Court's prior decisions such as *Mullane v. Central Hanover Bank and Trusts Co.*, 339 U.S. 306 (1950) allegedly indicated that New Mexico's posting procedure is constitutionally untenable. Futhermore this is the first time any reference has been made to *Shaffer v. Heitner*, supra, despite the fact a constitutional challenge was raised in their first Petition for A Writ of Certiorari.

Even assuming arguendo that *Shaffer v. Heitner* broke relevant new ground, Petitioners cannot escape the effects of res judicata. Using Petitioners' theory, every time a new decision of the Court is announced, any case to which it might apply can be reopened for further

consideration. It is precisely to avoid that situation that the doctrine of res judicata developed. There must at some point be an end to litigation as the present case clearly demonstrates. The case law is uniform on this point. See *American Surety v. Baldwin*, supra; *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, (1940) (Bondholders who had chance to challenge constitutionality of a provision of Bankruptcy Act but who failed to do so cannot afterwards seek relief from decree on grounds provisions declared unconstitutional in a later proceeding); *Douglas-Guardian Warehouse Corporation v. Posey*, 486 F.2d 739, 742 (10th Cir. 1973). (Where Appellant failed to challenge constitutionality of Colorado replevin law, court would not apply rule of *Fuentes v. Shevin*, 407 U. S. 67 (1922) striking down such statutes retroactively. Appellant is bound by the doctrine of res judicata); Moore's Federal Practice, Vol 1.B, Section 0.415, pp.2051-2058.

This Court will not and cannot pass upon the constitutionality of a state rule before the state courts have had an opportunity to do so. *Adler v. Board of Education*, 342 U. S. 485, 496, (1952), and *N.L.R.B. v. Seven-Up Co.*, 344 U. S. 344, 350 (1953). New Mexico's rules for service of process are fundamental to its entire system of administration of justice and any attack on its constitutionality should be made in New Mexico's own courts in a clear, direct manner so that the issue can be fully and thoroughly brief to the extent such an important question warrants.

Furthermore, as Petitioners point out, the New Mexico Supreme Court amended Rule 4 (e) (1) effective October 1, 1979. See Petitioners' Brief page 4. If a case is to be reviewed by this Court, it should come from one of the states still having an equivalent rule or from some previously filed New Mexico case where the question was properly raised.

There was in fact no federal question decided in this case in the New Mexico Supreme Court and there is nothing for this Court to review. The Petition should be denied.

II. PETITIONERS THEMSELVES WERE NOT DEPRIVED OF DUE PROCESS OF LAW SINCE SERVICE MADE UNDER RULE 4 (e) (1) PRIOR TO AMENDMENT COMPLIED WITH DUE PROCESS.

Petitioners rely heavily on *Shaffer v. Heitner*, supra. While that case is important, it is important for issues not involved in this case. *Shaffer v. Heitner* dealt with due process considerations involved in determining when a state court has jurisdiction over an out of state defendant based on the presence of property owned by the defendant in the state. The answer was that the minimum contacts test of *International Shoe Co. v. Washington* 326 U. S. 310 (1945) applies even to in rem proceedings. There is no out of state defendant in the present case. The present case is not concerned with minimum contacts. The Petitioners (defendants below) have at all relevant times been physically present in New Mexico as has the property which is itself the subject of the lawsuit. The issue involved is the adequacy of notice provided by Rule 4 (e) (1) of the New Mexico Rules of Civil Procedure prior to amendment i.e. is it reasonably calculated to apprise a defendant of the pendency of a suit.

Mandatory personal service of process is the only method of guaranteeing actual notice of a law suit against an adversary. Such a requirement would work a great injustice on those seeking the courts to settle disputes and achieve legal remedies. Causes of action could be easily thwarted by defendants avoiding personal service of process. Such is not the law now, nor has

it ever been the law. *Nelson v. Chicago, B. & Q. R. Co.*, 80 N.E. 109 (1907).

Due process of law as required by the Fourteenth Amendment to the United States Constitution demands that service of process in any proceeding is notice that is reasonably certain under all the circumstances to inform the defendant. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306 (1950).

Each case that involves substituted service of process must be examined in its entirety to determine all the facts and circumstances of the method of service that was used, with any decision as to satisfactory of unsatisfactory adherence to due process requirements to be made upon the evidence found by the trier of fact. Where substituted process on residents of the forum has been used, each case has been examined by the appellate courts of the state[1] and federal[2] courts to determine if, as a factual matter, due process was provided. Where the facts, as found by the trial court, have been found to be supported by substantial evidence, the appellate courts have affirmed the method of substituted service of process used. When the decision of the trial court was not

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[1] *Decher v. Gwinn*, 20 S.E. 240 (GA. 1894); *Nelson v. Chicago, B. & Q. R. Co.*, 80 N.E. 109 (Ill. 1907); *Williamson v. Taylor*, 122 S.E. 530 (W. Va. 1924); *John Hancock Mut. Life Ins. Co. v. Cooley*, 83 Pacific 2d 221 (Wash. 1938); *Holtberg v. Brommersbach*, 52 N.W. 766 (Minn. 1952); *Rash v. American Federation of Labor*, 116 N.W. 2d 175 (Minn. 1962); *Spiegelman v. Birch*, 129 S.E. 2d 119 (Va. 1963); *Gunning Light & Supply Co. v. Gunning Electric Co.*, 100 A. 2d 495 (Conn. 1963); *Houden v. Hubbell*, 80 N.M. 764 (1969); *Vann Tool Co. v. Grace*, 90 N.M. 544 (1977)

[2] *Nations v. Johnson*, 65 U.S. (24 How.) 628 (1861); *Earle v. McVeigh*, 91 U.S. 398 (1876); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Milliken v. Meyer*, 322 U.S. 457 (1940); *First National Bank & Trust Co. of Tulsa v. Ingerton*, 207 Fed 2d 793 (10th Cir. 1953).

supported by the evidence, the appellate courts have been quick to quash the service of process. The New Mexico Appellate Courts have been assiduous in enforcing due process requirements in interpreting and applying Rule 4 (e) (1), as it relates to substituted service of process.[3]

An analysis of New Mexico Supreme Court cases involving the issue of substituted service of process indicates that the Court has carefully examined the facts as found by the trial court and determined whether substantial evidence existed to support the lower court findings and conclusion,[4] while at the same time construing the New Mexico substituted service of process statute strictly.[5] In each case affirming the method of substituted service of process used[6] and in each case where substituted service of process was quashed,[7] the

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[3] *Spiegelberg v. Sullivan*, 1 N.M. 575 (1973) affirming substituted service of process; *Vigil v. Pradt*, 5 N.M. 161 (1889) quashing manner of substituted service; *Bell v. Gaylor* 6 N.M. (Gild.) 227 (1891) affirming manner of substituted service; *Household Finance Corporation v. McDevitt*, 84 N.M. 465 (1973) quashing manner of substituted service; *Federal Land Bank of Wichita v. Burgett*, filed June 13, 1977, and unreported, rehearing denied June 30, 1977, unreported, affirming method of substituted service of process; *Vann Tool Co. v. Grace*, 90 N.M. 544 (S. Ct. 1977) quashing manner of substituted service.

[4] Spura f.n.3.

[5] *Household Finance Corporation v. McDevitt*, supra.

[6] *Spielgelberg v. Sullivan*, supra, where defendant absconded and was avoiding service of process; *Bell v. Gaylor*, supra, where defendant absent from his home and premises; *Federal Land Bank of Wichita v. Burgett*, supra, the instant case.

[7] *Vigil v. Pradt*, supra, process posted on former residence of defen-

New Mexico Supreme Court decision has turned on (a) evidence that the process server made an actual determination that the defendant still lived in the premises; (b) the party defendant was only temporarily absent from the premises in which he lived; (c) the process server determined the most public part of the premises where the defendant lived, i.e. the most heavily used entrance to the house; (d) no one was present at the premises and house who was willing to accept the service of process; and (e) the return of service shows attachment was made to the "usual place of abode" of the defendant.[8]

The New Mexico Supreme Court has adopted its definition of "usual place of abode" from the West Virginia case of *Williamson v. Taylor*, 122 S. E. 530 (1924)[9] wherein the West Virginia court defined the term as follows:

> "Under the satute the usual place of abode' means customary place of abode at the very moment the writ is left posted; hence, where the writ is left posted at a former place of abode, but from which defendant had, in good faith, removed, and taken up his place of abode elsewhere, service so had is ineffective and invalid."

This definition was reaffirmed and quoted with approval by the New Mexico Supreme Court a few weeks following the disposition of this instant case before the

dant 50 miles from usual place of abode; *Houden v. Hubbell*, supra, improper identification of defendant as party to suit; *Household Finance Corporation v. McDevitt*, supra, defendant separated from husband and moved to another abode; *Vann Tool Co. v. Grace*, supra, where defendants had moved from house they still owned prior to service.

[8] Supra f.n. 6 and 7.

[9] *Household Finance Corporation v. McDevitt*, supra.

New Mexico Supreme Court in the case of *Vann Tool Co. v. Grace*, 90 N.M. 544 (S.Ct. 1977).

As each case in New Mexico relies on its own individual facts, nothing would be gained by having this Court review this particular case. A decision resting on substantial evidence is particularly inappropriate for this Court's consideration. No substantial question of importance exists as to the use of the New Mexico Rule and its application pursuant to the New Mexico Constitution and the United States Constitution.

Since the Petitioners are residents of the State of New Mexico, and this action was originally brought before the New Mexico courts on a foreclosure of mortgage on New Mexico real estate, New Mexico's constitution and laws must first be applied and interpreted. Application and intepretation of the New Mexico Constitution and laws should first be addressed by the New Mexico courts. On the question of proper substituted service of process, each state has traditionally been free to provide its own methods of substituted service of process on its own residents so long as those methods of substituted service of process comport with traditional notions of fair play and substantial justice.[10]

Each state may determine for itself what method of substituted service of process may be used within its own boundaries.[11] Each resident of the state is thus

[10] *Milliken v. Meyer*, 357 U.S. 457 (1943).

[11] *Blackmer v. United States*, 284 U.S. 421 (1932); *Milliken v. Meyer*, supra; *Bell v. Gaylord*, 6 N.M. 227 (1891); *Nelson v. Chicago, B. & Q. R. Co.*, 80 N.E. 109 (1907), where it was stated:

> It is also held that each state may determine for itself in what method process may be served upon its citizens within its own boundaries, and while such legislation will

bound to the laws of the state[12] and the methods of substituted service of process, provided those methods meet the tests of providing due process of law.[13]

Substituted service of process by posting on the door of the "usual place of abode" is reasonably calculated to give actual notice of the proceedings. The rule and its underlying reason was most succinctly stated in *Earle v. McVeigh*[14] wherein the court stated:

> "When the law provides that notice may be posted on the 'front door of the parties usual place of abode,'

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have no force outside the state, service of process, within the state in the manner pointed out in the statute regulating the method of obtaining such constructive service of process, if the method of service of process provided for is such to amount to due process of law, as these terms are used in the state and federal Constitutions, will be sufficient to authorize the courts of the state within whose jurisdiction the service of process is had to pronounce a personal judgment or decree against a defendant so served with process, although cases may arise in practice upon such constructive service of process where a personal judgment or decree might be obtained against a defendant without such defendant having received actual notice of the pendency of the action prior to judgment or decree. Constructive service of process, it is said, is authorized in a certain class of cases, such as when the defendant has gone out of the state, or when he cannot be found, or when he conceals himself, so that process cannot be served upon him, as the result of necessity; that is, such constructive service of process is substituted for actual service of process when actual service of process cannot be had upon a defendant.

[12] *Milliken v. Meyer*, supra.

[13] Nelson v. Chicago B. 0 Q.R. Co., supra.

[14] 91 U.S. 398 (1876)

> in the absence of the family, the intention evidently is that the person against who the notice is directed should then be living or have his home in the said house. He may be temporarily absent at the time the notice is posted; but the house must be his usual place of abode, so that when he returns home, the copy of the process posted on the front door will operate as notice; which is all that the law requires. By the expression, 'the usual place of abode,' the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence where the notice may be posted and constitute a compliance with the legal requirement."[15]

The trial court in this case did find that the service of process attached to the Burgetts' door was on the door of their "then present residence". Constitutional due process was accorded the Defendants in this case and is so accorded in New Mexico to all defendants served pursuant to Rule 4 (e) (1) of the New Mexico Rules of Civil Procedure.

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[15] 91 U.S. at 400.

CONCLUSION

Certiorari should not be granted because the questions presented in the Petition were not timely presented before the Courts of New Mexico. No federal question of importance has been presented since process was made in a manner most reasonably calculated to give notice of the law suit commenced. New Mexico can determine what is the most sutable method of substituted process for its residents where due process is provided.

Respectfully submitted,

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